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IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON,

Respondent,

v.

BLESS CHIECHI

Appellant.

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ON APPEAL FROM THE  
SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR COWLITZ COUNTY

The Honorable Stephen M. Warning, Judge

OPENING BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. The trial court erred in giving a first aggressor instruction to the jury. Clerk’s Paper (CP) 89; (Instruction 21).

2. Appellant Bless Chiechi was denied his right to effective assistance of counsel when his attorney failed to object to a first aggressor instruction.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. By submitting the aggressor instruction to the jury where the instruction was not supported by the evidence, did the trial court deprive appellant of his right to present his defense and his right to have the prosecution prove every element of the charge against him beyond a reasonable doubt without sufficient evidence that Mr. Chiechi was the first aggressor? Assignment of Error 1.

2. Was defense counsel ineffective for failing to object to the aggressor instruction where the instruction deprived appellant of his argument based on self-defense? Assignments of Error 1 and 2.

**C. STATEMENT OF THE CASE**

**1. Procedural facts:**

Bless Chiechi was charged in Cowlitz County Superior Court by information with one count of first degree assault, contrary to RCW 9A.36.011(1)(a). Clerk’s Papers (CP) 12-13. The information alleged that on August 27, 2017, Mr. Chiechi intentionally used a baseball bat or club to

strike Berry Bernard in the head. CP 12. The State also alleged Mr. Chiechi was “armed with a deadly weapon other than a firearm” at the time of the offense. RCW 9.94A.825. CP 12.

The matter came on for jury trial on June 19, 20, and 21, 2018, the Honorable Stephen M. Warning presiding. 2Report of Proceedings<sup>1</sup> (RP) at 76-247; 3RP at 252-420; and 4RP at 424-493.

Mr. Chiechi received an inferior degree offense instruction for second degree assault. CP 84. The court also gave self-defense instructions and a “first aggressor” instruction. CP 85-89.

**a. Verdict and sentencing:**

The jury found Mr. Chiechi guilty of first degree assault on June 21, 2018. 4RP at 489. The jury also found by special verdict that Mr. Chiechi was armed with a deadly weapon at the time of the offense. 4RP at 490; CP 94, 95.

At sentencing on July 11, 2018, defense counsel argued for an exceptional sentence downward pursuant to RCW 9.94A.535(1). RP at 64-66. Counsel argued that Mr. Bernard initiated or provoked the fight. RP at 64. The sentencing court found that Mr. Bernard contributed to the

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<sup>1</sup>The record of proceedings consists of the following transcribed hearings: 1RP – September 13, 2017, September 14, 2017, September 21, 2017, September 25, 2017, October 24, 2017, November 16, 2017, January 18, 2018, March 22, 2018, April 23, 2018, June 14, 2018, and July 11, 2018 (sentencing); 2RP – June 19, 2018 (CrR 3.5 hearing; jury trial, day 1); 3RP – June 20, 2018, (jury trial, day 2); and 4RP – June 21, 2018 (jury trial, day 3).

fight, stating:

There's a lot of question about how this whole thing actually got started, but I don't think there's any question, from anyone's testimony, that Mr. Bernard was a significant participant in the event. But also, everybody agrees that at some point Mr. Chiechi substantially upped the stakes and turned a fist fight into what is probably very lucky not to have been a homicide.

I've been giving this one a lot of thought in the intervening time, and I think there is a basis for an exceptional sentence, based on the victim's participation in the initial assault that ultimately led to this.

1RP at 66.

Based on the mitigating factor, the court imposed an exceptional sentence of 72 months, which is below the standard range of 93–123 months. CP 99, 100. The court also imposed a 24-month deadly weapon enhancement, for a total of 96 months, followed by 36 months of community custody. 1RP at 67; CP 100, 101. The court made the following finding of fact in support of the exceptional sentence downward: "That the victim, Berry Bernard, was an initiator or provoker of the incident." CP 105.

The court waived non-mandatory legal financial obligations and ordered that Mr. Chiechi pay a \$500.00 victim assessment and \$100.00 DNA collection fee. CP 102.

Timely notice of appeal was filed July 11, 2018. CP 110. This appeal follows.

**3. State's Case:**

Berry Bernard and Bless Chiechi are from the island of Chuuk, one of the four states of the Federated States of Micronesia. 2RP at 198. Mr. Bernard moved to Kelso, Washington, approximately four years before the incident, after having previously lived in Portland, Oregon and Guam. 2RP at 198. Mr. Bernard works at Foster Farms, a chicken processing company. 2RP at 198. Neither Mr. Bernard nor Mr. Chiechi speak English with proficiency, and their native language is Chuukese. 2RP at 173-74, 198, 3RP at 379.

Mr. Bernard and Mr. Chiechi, along with several other people, were at the house of Mr. Bernard's cousin, Manity Mazawa, on Saturday August 26, 2017. 2RP at 198. Mr. Mazawa's house is located at 710 South Fourth Avenue in Kelso. 2RP at 198-99. Andrick Andreas and another man named Cassidy, who is also Chuuk, were also present. 2RP at 202.

Mr. Bernard was drinking Budweiser beer at Mr. Mazawa's house and had consumed eight beers. 2RP at 200, 214. At approximately 9:00 p.m., Bless Chiechi arrived at the house. 2RP at 201.

Mr. Bernard testified that Mr. Chiechi and Cassidy were arguing, and that Mr. Chiechi was angry, swearing, "using strong words," and threatening Cassidy. 2RP at 203-04. Mr. Bernard stated that he told Mr. Chiechi not to cause any problems in Cassidy's house and that "he cussed at me" and "told me not to say anything." 2RP at 205. He stated that Mr.

Chiechi swore at him, denigrated his mother, and told him that if he wanted to fight, he would have to go outside. 2RP at 205. Mr. Bernard stated that they went outside and “threw punches at each other,” and that he was holding him, and that he released Mr. Chiechi, who then ran to his house at 801 ½ South Third Avenue, located about a block and half away. 2RP at 207-08.

Mr. Bernard stated that while standing outside, he heard Mr. Chiechi call his name, and when he turned, Mr. Chiechi hit him twice on the left side of his head with a baseball bat. 2RP at 208. He stated that he tried to hit him a third time, which he blocked with his left arm and then was hit again on his legs, and then on the right side of his head. 2RP at 209. He stated that after that “we fought again,” and that he “left because his wife was saying she was going to call the cops.” 2RP at 210.

Mr. Bernard stated that he then went to his house at 1111 South Sixth Avenue in Kelso and his wife’s sister, Raulina Erwin, called 911. 2RP at 211.

Mike Saito arrived at Mr. Mazawa’s house at approximately 1:00 a.m. and went outside when Mr. Bernard and Mr. Chiechi went out. 2RP at 230. He stated that Mr. Bernard was “pulling on Bless’s hair.” 2RP at 230. He said they “crossed to Bless’s house” and that Mr. Bernard had ‘had hold of’ Mr. Chiechi as they went down the sidewalk toward Mr. Chiechi’s house. 2RP at 231. He said that both of them were on ground,

and then got up, and that this took place close to Mr. Chiechi's house. 2RP at 237. He stated that he talked to Mr. Bernard and "told him to let [Bless Chiechi] go and not to fight." 2RP at 231. Mr. Bernard did not listen to him, so Mr. Saito returned to the house on South Fourth Avenue and told Mr. Mazawa, who had remained in the house, that they were fighting. 2RP at 231. Mr. Mazawa did not want to interfere and Mr. Saito then ran back to the two men, at which time Mr. Bernard was still holding Mr. Chiechi. 2RP at 232. Mr. Saito stated that Mr. Chiechi then got a bat from his car and both the men "ran towards each other." 2RP at 233, 239, 243. Mr. Saito said that Mr. Chiechi hit Mr. Bernard six times with the bat. 2RP at 233. He stated that Mr. Bernard took the bat away from him and "threw it away because they said they were going to call the cops." 2RP at 233.

Raulina Erwin lived with Mr. Bernard at 1111 South Sixth in Kelso at the time of the incident. 3RP at 255. Ms. Erwin's husband is Mr. Bernard's brother. 3RP at 261. Ms. Erwin is also from Chuuk, Micronesia, and as a child went to elementary school in Portland, Oregon, returned to Chuuk, and moved back to the United States in 2007. 2RP at 254.

Bless Chiechi is the nephew of Ms. Erwin's husband. 3RP at 258. Mr. Bernard went back to the house at 1111 South Sixth. 2RP at 255. Mr. Bernard's wife, who is Ms. Erwin's sister, called Ms. Erwin from upstairs

to look at Mr. Bernard. 3RP at 255-56, 263. Ms. Erwin stated that Mr. Bernard was drunk and injured, and that his head was swollen on both sides. 3RP at 256, 264, 265. Ms. Erwin called 911, and Mr. Bernard was subsequently transported by ambulance to St. John Medical Center in Longview. 3RP at 257.

Kelso police officer Kevin Tate was dispatch to the house following the 911 call and contacted Ms. Erwin. 3RP at 270. While talking with Ms. Erwin, Officer Tate saw Mr. Bernard walk into the room, and the officer noted that he had two oblong swollen areas on his temples, and injuries to the outside of his left forearm. 3RP at 270. While talking with Officer Tate, Mr. Bernard vomited and “appeared to want to sleep.” 3RP at 272. Officer Tate called for an ambulance and Mr. Bernard was transported to St. John Medical Center in Longview. 3RP at 273. Officer Tate testified that Mr. Bernard told him that there was no fight when Mr. Chiechi and Mr. Bernard walked to Mr. Chiechi’s house, but that once they arrived at the house, Mr. Chiechi hit him with a baseball bat. 3RP at 285.

After talking with Ms. Erwin and Mr. Bernard, and after calling an ambulance, Officer Tate went to 801 ½ South Third Avenue to locate Mr. Chiechi, but was not able to find him. 3RP at 274.

Dr. James Bruce, an emergency room physician at St. John’s Medical Center at the time of the incident, treated Mr. Bernard after he arrived at the emergency department at 5:19 a.m. on August 27, 2017. 3RP

at 293. Dr. Bruce noted that he had significant bruising to his head on both temples, and in particular bruising to his left temple, and that he was vomiting. 3RP at 294, 298. Mr. Bernard also had bruising to the distal part of his left right wrists and left forearm and left knee. 3RP at 294. Mr. Bernard was brought into the hospital on stretcher and his neck was immobilized with a cervical collar. 3RP at 295.

Mr. Bernard told Dr. Bruce that he had been drinking for much of the previous day, and Dr. Bruce testified that his blood alcohol level was determined to be .22. 3RP at 295. Dr. Bruce testified that Mr. Bernard's head contusions would require the use of a "blunt instrument of a fair size to be able to do that." 3RP at 296. Dr. Bruce testified that Mr. Bernard suffered a subarachnoid hemorrhage, and that the type of injuries he observed can cause a risk of death. 3RP at 299, 300, 301, 303, 304. Because the injuries could require a neurosurgeon, Dr. Bruce contacted a neurosurgeon at Southwest Washington Medical Center in Vancouver, and Mr. Bernard was transferred to the intensive care unit at that facility. 3RP at 304-05.

Cassandra Sappington, a physician's assistant at Southwest Washington Medical Center, treated Mr. Bernard after he was transported. 3RP at 350-360. She described a subarachnoid hemorrhage as bleeding within the skull that is outside the brain but inside the skull. 3RP at 350. She stated that in addition to the subarachnoid hemorrhage, Mr. Bernard had

swelling on the outside of his skull and collection of blood in the soft tissues. 3RP at 352. Mr. Bernard was evaluated by Dr. Lee, a neurosurgeon, but surgery was not required. 3RP at 353. Mr. Bernard was discharged from the medical center on August 29, 2017. 3RP at 355.

Ms. Erwin stated that after the incident, Mr. Bernard continued to live at the house, and that he had trouble remembering things. 3RP at 261.

Police obtained a warrant to search for a baseball bat at the house at 801 ½ South Third for a baseball bat. 3RP at 317-18. Police searched the house on September 1<sup>st</sup> and found a metal baseball bat behind a couch in the living room. 3RP at 319. Mail addressed to Mr. Chiechi was found at the house and entered into evidence. 3RP at 320, 325.

Kelso police officer Timothy Gower interviewed Mr. Chiechi in a holding cell at the Kelso Police Department on September 12, 2017. 3RP at 328. Officer Gower testified that Mr. Chiechi told him that Mr. Bernard started the fight and that Mr. Bernard was intoxicated, but that Mr. Chiechi was not. 3RP at 330. Officer Gower stated that Mr. Chiechi said that he was trying to go home and that Mr. Bernard followed him and grabbed Mr. Chiechi's hair. 3RP at 335. The officer stated that Mr. Chiechi told him that Mr. Bernard had him in a headlock until they got to the carport at Mr. Chiechi's house, 801 ½ South Third, which is about a block and half from 710 South Fourth Avenue. 3RP at 335. He told the officer that he was able to get a miniature baseball bat out of his car and that he used it to hit

Mr. Bernard six times. 3RP at 330, 341. Officer Gower said that Mr. Chiechi told him that he used the bat to hit Mr. Bernard once in the leg, twice on his body and three times in the head. 3RP at 330. He stated that Mr. Chiechi told him that Mr. Bernard ran away and then returned with pruning sheers or a similar object and swung the sheers at him, but that Mr. Chiechi was able to duck and was not hit, and that Mr. Bernard then left. 3RP at 330, 331.

Officer Gower stated that Mr. Chiechi told him that Mr. Chiechi was not able to go inside his house when Mr. Bernard had him in a headlock because the door was locked and he did not have a house key. 3RP at 331. After Mr. Bernard left the second time, Mr. Chiechi was able to make enough noise to wake up his wife, who opened the door and let him into the house. 3RP at 331-32. Officer Gower stated that Mr. Chiechi told him that he threw the bat away and that the full size baseball bat found by police during the search on September 1 was not the bat he had used on August 27, which Mr. Chiechi said was a smaller, blue bat. 3RP at 332.

Officer Gower interviewed Mr. Bernard, who told the officer that he was walking toward Mr. Chiechi's house as they argued and that he grabbed Mr. Chiechi's hair and put him in a headlock until they got near Mr. Chiechi's residence at 801 ½ South Third. 3RP at 335.

### **3. Mr. Chiechi's defense**

Mr. Chiechi testified<sup>2</sup> that he went to Mr. Mazawa's house and was drinking beer with Cassidy, Mr. Mazawa, Mr. Bernard, Mr. Saito and Mr. Andreas. 3RP at 380. Mr. Chiechi stated that he had one beer and was not intoxicated, but that Mr. Bernard appeared to be drunk. 3RP at 381. Mr. Bernard was aggressive to Mr. Chiechi, telling him that he wanted to fight. 3RP at 382. He stated that he told the uncle of Mr. Bernard to calm him down, but he did not listen to his uncle and Mr. Chiechi then left the house to avoid fighting. 3RP at 383. Mr. Bernard followed Mr. Chiechi back to Mr. Chiechi's house, and then grabbed and pulled his hair from behind, which he wore in a ponytail at the time. 3RP at 383. Mr. Bernard held Mr. Chiechi so that he could not turn around, and then pushed him toward the grass while walking to Mr. Chiechi's house. 3RP at 384. He stated that he told Mr. Bernard to stop fighting and that he did not push him "because I didn't want to fight." 3RP at 385.

Mr. Bernard was holding his hair with one hand and then started punching him with the other hand, and as they got closer to his house--- while Mr. Bernard was still holding his hair in one hand---Mr. Chiechi was able to reach his remote keylock to open his car, which was parked on the street, and retrieve a small metal bat from his car. 3RP at 385. Mr.

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<sup>2</sup>During his testimony, Mr. Chiechi alternated between answering directly in English and through an interpreter. 3RP at 379-404.

Chiechi used the bat to hit Mr. Bernard on the legs. 3RP at 385-86. Mr. Bernard released his grip on Mr. Chiechi's ponytail and left but came back about three minutes later with a two-handled metal cutter, which he used to hit Mr. Chiechi. 3RP at 386. Mr. Chiechi hit him with the bat "[t]o protect me from being injured." 3RP at 388-89. After hitting Mr. Bernard, Mr. Bernard ran toward Mr. Chiechi's car and Mr. Chiechi hit him again. 3RP at 389-90. Mr. Chiechi's wife Nachrine Marcelino then opened the front door and told Mr. Bernard to leave and that she was going to call the police, at which time he left. 3RP at 390.

Ms. Marcelino stated that on August 27 she was in their house at 801 ½ South Third, and heard people talking outside. 3RP at 375. She opened the door and saw her husband and Mr. Bernard fighting and yelled for them to stop. 3RP at 376. She testified that Mr. Bernard had a red metal object in his hands. 3RP at 376. After she yelled at them Mr. Bernard left and Mr. Chiechi came inside the house. 3RP at 376-77. She stated that after the incidence she noticed that her husband had bruises on his right side. 3RP at 377.

Andrick Andreas testified that Mr. Bernard, Mike Saito, Mr. Chiechi, and others were drinking beer at Mr. Mazawa's house. 3RP at 362. He stated that Mr. Chiechi was "not that drunk," but that Mr. Bernard appeared to be intoxicated and was "swaying around." 3RP at 363. He testified that Mr. Bernard and Mr. Chiechi started to argue and that Mr.

Bernard wanted to fight Mr. Chiechi. 3RP at 363-64. Mr. Bernard and Mr. Chiechi went outside the house, but he stayed inside. Mr. Saito also went outside, but came back inside and said that they were fighting. 3RP at 365. Mr. Andreas stated that Mr. Bernard and Mr. Chiechi were outside Mr. Mazawa's house, they were initially arguing and then "they started pushing and shoving." 3RP at 371.

Mr. Saito and Mr. Andreas left the house on Fourth Avenue and went to Mr. Chiechi's house and told Mr. Bernard that he would have to return to Mr. Mazawa's house, but he did not listen to them. 3RP at 366. Mr. Andreas said that when he saw Mr. Bernard after he "finished fighting," and that Mr. Bernard was holding a red mental two handled leaf cutter. 3RP at 367.

#### **D. ARGUMENT**

##### **1. THE COURT'S UNSUPPORTED FIRST AGGRESSOR INSTRUCTION REQUIRES REVERSAL**

- a. This challenge may be raised for the first time on appeal because the improper instruction is a manifest error affecting a constitutional right*

Although Mr. Chiechi did not object to the first aggressor jury instruction below<sup>3</sup>, review of the issue for the first time on appeal is proper under RAP 2.5(a)(3). A party may challenge a manifest error affecting a

constitutional right for the first time on appeal. RAP 2.5(a)(3). To meet this test, “an appellant must demonstrate (1) the error is manifest, and (2) the error is truly of constitutional dimension.” *State v. O’Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). A constitutional error is manifest under RAP 2.5(a)(3) “if it results in a concrete detriment to the claimant’s constitutional rights, and the claimed error rests upon a plausible argument that is supported by the record.” *State v. WWJ Corp.*, 138 Wn.2d 595, 603, 980 P.2d 1257 (1999).

Once a claim of self-defense is asserted, the absence of self-defense becomes an element of the crime that the State has the burden to disprove beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 493–94, 656 P.2d 1064 (1983). A defendant has the constitutional right “to have a jury base its decision on an accurate statement of the law applied to the facts in the case.” *State v. Miller*, 131 Wn.2d 78, 90-91, 929 P.2d 372 (1997). In the absence of an objection at trial, “an appellate court will consider a claimed error in an instruction if giving such an instruction invades a fundamental right of the accused.” *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997).

In this case, the jury was instructed that if it determined Mr.

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<sup>3</sup>RP at 418.

Chiechi was the first aggressor then he could not claim self-defense. CP 89; Instruction 21). Instruction 21 states in part: “Therefore, if you find beyond a reasonable doubt that defendant was the aggressor, and that defendant’s acts and conduct provoked or commended the fight, then self-defense is not available as a defense.” CP 89. The aggressor instruction invaded Mr. Chiechi's fundamental right to present a complete defense and the right to hold the State to its burden of proof. Therefore, the first aggressor instruction, if erroneous, implicates a defendant's constitutional rights. See *State v. Gordon*, 172 Wn.2d 671, 677, 260 P.3d 884 (2011).

The federal and state constitutional right to due process guarantees a defendant the right to defend against the State's allegations by presenting a complete defense. *State v. Wittenbarger*, 124 Wn.2d 467, 474, 880 P.2d 517 (1994); *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986); U.S. Const. amend. V and XIV; Wash. Const. art. 1, § 3. In this case, the right to present a complete defense encompassed Mr. Chiechi’s assertion of self-defense.

Because Mr. Chiechi’s constitutional rights are implicated, the next question is whether he can show the error in giving the first aggressor jury instruction had practical and identifiable consequences on the trial. See *State v. O’Hara*, 167 Wn.2d at 99 (defining manifest error) (quoting *State*

*v. Kirkman*, 159 Wn.2d,918,935,155 P3d 125 (2006)). Based on these constitutional guarantees, Mr. Chiechi had the right to have the jury fully consider his claim of self-defense. The aggressor instruction undermined that right by directing the jury to ignore his claim of self-defense if it found that he was the aggressor. This instruction had the effect of relieving the State of its burden of proving the absence of self-defense beyond a reasonable doubt by improperly permitting the jury to disregard her self-defense claim by finding him to be the aggressor. The improper aggressor instruction constitutes a manifest constitutional error.

***b. The trial court's improper use of the "aggressor" instruction Requires reversal***

Mr. Chiechi was not the first aggressor in the altercation, but the trial court nonetheless gave a first aggressor instruction. The State argued that Mr. Chiechi was the initial aggressor because Mr. Chiechi "comes to attack Mr. Bernard with the bat," that he is the aggressor and that forced Mr. Bernard to defend himself. 4RP at 458. The defense, on the other hand, argued that Mr. Chiechi "was not the one that wanted to get in a fight at that time." 4RP at 478. The account of the incidents, which diverged tremendously between the testimony of Mr. Bernard and Mr. Chiechi, showed that there were two incidents, the first of which Mr.

Bernard subdued Mr. Chiechi by “holding him.” 2RP at 207.

The record shows that although Mr. Bernard demised being armed with a weapon, it is clear that the incident ended when he was in front of Mr. Chiechi’s house when he was hit with the bat because Mr. Chiechi’s wife came outside and said that she was going to call the police. 2RP at 210. In this case, the evidence supports Mr. Chiechi’s version of events that there was an initial argument in front of Mr. Mazawa’s house on Fourth Avenue and that Mr. Bernard went to Mr. Chiechi’s house on South Third Avenue. Reversal is required because the record does not support an aggressor instruction.

***c. The court gave the first aggressor instruction without explanation and the prosecutor exploited that instruction to undermine Mr. Chiechi's self-defense argument***

The court gave self-defense instructions proposed by the State. CP 41-65. The court, however, also gave the State’s proposed first aggressor instruction. Instruction 21 states:

No person may, by any intentional reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon, use, offer or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that defendant was the aggressor, and that defendant’s acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.

Instruction 21, CP 89.

In closing argument, the prosecutor exhorted the jury to reject Mr. Chiechi's self-defense claim because he was the first aggressor. 4RP at 458. The prosecutor argued that there were two incidents, that Mr. Bernard “controlled” Mr. Chiechi and then left him go and, then, about three minutes later, Mr. Chiechi returned and hit him with a bat. 4RP at 458. The prosecutor argued:

So, we have one incident. Mr. Bernard controls the situation, wins the first incident and he lets him—I’m done, let me go, he lets him go. One incident. Then we have the second incident. The Defendant goes and gets a bat. The Defendant takes the bat toward—he comes to attack Mr. Bernard with the bat. Mr. Bernard turns around he takes him on. Mike Saito saw it.

Defendant is the aggressor in that situation. It allows Mr. Bernard to use force to defend himself. Defendant can’t say, well, I needed to defend myself about this person who was fighting with me, because he is the one who brought the bat at him. Because he is the aggressor, this isn’t self-defense. This is an attack with a baseball bat out of retaliation.

4RP at 458-59.

Defense counsel in his closing argument denied that Mr. Chiechi was the first aggressor, arguing that Mr. Chiechi was walking back to his house and that he was attacked from behind by Mr. Bernard, who pulled his hair and put him in a headlock, hitting Mr. Chiechi, leaving and then returning with metal sheers and hitting Mr. Chiechi. 4RP at 466.

*d. The court erred in giving the aggressor instruction*

The trial court's decision to grant the instruction is not supported by the record. The decision overlooks the testimony of Mike Saito, who testified that he was outside and saw Mr. Bernard grab Mr. Chiechi by the hair. It also overlooks the clear evidence that Mr. Chiechi was in retreat; he left—either under his own volition (as argued by the State), or while placed in a headlock by Mr. Bernard (the defense argument). It is clear, whichever version of events was before the court, that the incident involving the bat took place in front of or near Mr. Chiechi's house on Third Avenue, a point overlooked by the court. This important point supports the defense theory that Mr. Chiechi was not acting as an aggressor or in retaliation, but instead supports his claim of self-defense.

A first aggressor instruction potentially removes self-defense from the jury's consideration, relieving the State of its burden of proving that a defendant did not act in self-defense. *State v. Douglas*, 128 Wash.App. 555, 563, 116 P.3d 1012 (2005). For that reason, it is to be given only sparingly and carefully, in cases where the theories of the case cannot be sufficiently argued and understood by the jury without such an instruction. *State v. Riley*, 137 Wash.2d 904, 910 n. 2, 976 P.2d 624 (1999). To

support a first aggressor instruction the state must offer credible evidence that the defendant provoked the use of force, including provoking an attack that necessitates the defendant's use of force in self-defense. *Riley*, 137 Wn.2d at 909-10.

"[T]he initial aggressor doctrine is based upon the principle that the aggressor cannot claim self-defense because the victim of the aggressive act is entitled to respond with lawful force." *Riley*, 137 Wn.2d at 912. Whether sufficient evidence justified a first aggressor instruction is a question of law reviewed de novo. *State v. Bea*, 162 Wn. App. 570, 577, 254 P.3d 948 (2011). This Court reviews the evidence in the light most favorable to the party requesting the first aggressor instruction. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2002).

A defendant asserting self-defense must produce some evidence that he or she acted in reasonable apprehension of great bodily harm and imminent danger. *Riley*, 137 Wn.2d at 909. While the defendant need not show he or she was in actual danger, a defendant who provoked the confrontation cannot later claim his actions were in self-defense. *Douglas*, 128 Wn. App. at 562.

The evidence presented at trial suggests strongly that Mr. Chiechi

was not the first aggressor. The evidence showed that Mr. Chiechi was argumentative with Cassidy and then Mr. Bernard, but the record shows that both were willing to leave the house and fight, and that any fight that occurred was mutual. 2RP at 207. The record also shows that although Mr. Bernard attempted to downplay this fact in his testimony, the parties went from the house at Fourth Avenue to Mr. Chiechi's house on Third, a clear sign that Mr. Chiechi was trying to get away, and supportive of Mr. Chiechi's testimony that Mr. Bernard returned with a metal tool.

An aggressor instruction should be given only where the defendant provoked the need to act in self-defense. *Riley*, 137 Wn.2d at 909-10. Here, the initial fight appeared to be, at the most, mutual in nature; both men voluntarily left the house. From that point onward the record shows that Mr. Chiechi was attempting to get away from Mr. Bernard. Moreover, the court's ruling gives no credence whatsoever to Mr. Chiechi's version of events, which are just as plausible as Mr. Bernard's testimony.

It is error to give an aggressor instruction when not supported by the evidence. *State v. Brower*, 43 Wn. App. 893, 901-02, 721 P.2d 12 (1986). The error is constitutional in nature and cannot be deemed harmless unless the State proves it was harmless beyond a reasonable doubt. *State v. Birnel*, 89 Wn. App. 459, 949, P2d 433 (1998). Error is

harmless only if it is "trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case." *State v. Miller*, 131 Wn.2d 78, 90, 929 P.2d 372 (1997). An improper aggressor instruction is prejudicial because it guts a self-defense claim. *Birnel*, 89 Wn. App. at 473; *Brower*, 43 Wn. App. 902. The reviewing court must reverse unless this Court can properly conclude beyond a reasonable doubt that the jury verdict would have been the same absent the instructional error. *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010) (setting forth constitutional harmless error standard for improper jury instruction).

Here, the first-aggressor instruction negated Mr. Chiechi's claim of self defense, effectively and improperly removing it from the jury's consideration. The issuance of an aggressor instruction impermissibly bolstered the State's theory of Mr. Chiechi's conduct and necessarily undermined his claim of self-defense, relieving the State of its burden of proving lack of self-defense beyond a reasonable doubt.

As noted above, the giving of a first aggressor jury instruction here was manifest error affecting a constitutional right. Mr. Chiechi was not the first aggressor and the State was not entitled to a first aggressor jury instruction. See *State v. Stark*, 158 Wn. App. 952, 959, 244 P3d.

433(2010) (stating the circumstances under which a first aggressor jury instruction is proper). By giving the first aggressor jury instruction, the trial court precluded the jury from considering the self-defense claim. The conviction should be reversed and remanded for a new trial before a properly instructed jury.

**2. IN THE ALTERNATIVE, DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO THE FIRST AGGRESSOR INSTRUCTION**

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). See U.S. Const. amend. VI; Const. art. I, § 22 . a court reviews ineffective assistance of counsel claims de novo. *State v. Jones*, 183 Wn.2d 327, 338-39, 352 P.3d 776 (2015).

Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. *Strickland*, 466 U.S. at 687; *Thomas*, 109 Wn.2d at 225-26. *State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011).

To establish the first prong of the *Strickland* test, the defendant must show that “counsel’s representation fell below an objective standard of reasonableness based on consideration of all the circumstances.” *Thomas*, 109 Wn.2d at 229-30.

To establish the second prong, the defendant “need not show that counsel’s deficient conduct more likely than not altered the outcome of the case” in order to prove that he received ineffective assistance of counsel. *Thomas*, 109 Wn.2d at 226. Only a reasonable probability of such prejudice is required. *Strickland*, 466 U.S. at 693; *Thomas*, 109 Wn.2d at 226. A reasonable probability is one sufficient to undermine confidence in the outcome of the case. *Strickland*, 466 U.S. at 694; *Thomas*, 109 Wn.2d at 226.

Performance is deficient if it falls “below an objective standard of reasonableness based on consideration of all the circumstances.” *State v. McFarland*, 127 Wash.2d 322, 334-35, 899 P.2d 1251 (1995). Prejudice exists if there is a reasonable probability that “but for counsel’s deficient performance, the outcome of the proceedings would have been different.” *State v. Kylo*, 166 Wash.2d 856, 862, 215 P.3d 177 (2009); *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. The defendant must affirmatively prove prejudice and show more than a “ ‘conceivable effect on the outcome’ ”

to prevail. *State v. Crawford*, 159 Wash.2d 86, 99, 147 P.3d 1288 (2006) (quoting *Strickland*, 466 U.S. at 693, 104 S.Ct. 2052). At the same time, a “reasonable probability” is lower than a preponderance standard. *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052; *Jones*, 183 Wash.2d at 339, 352 P.3d 776. Rather, it is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052.

The court will begin its analysis with a strong presumption that counsel's performance was reasonable. *Grier*, 171 Wn.2d at 33; *Kyllo*, 166 Wash.2d at 862, 215 P.3d 177. Performance is not deficient if counsel's conduct can be characterized as legitimate trial strategy or tactics. *Id.* at 863, 215 P.3d 177. To rebut this presumption, the defendant must establish the absence of any “conceivable legitimate tactic explaining counsel's performance.” *Id.* (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)). If defense counsel's conduct can be considered to be a legitimate trial strategy or tactic, counsel's performance is not deficient. *Grier*, 171 Wn.2d at 33, 246 P.3d 1260.

Having raised a viable defense, there was no point in permitting the jury to disregard the theory by allowing them to receive an instruction that essentially told them the defense was unavailable. In other words, the only purpose of an aggressor instruction is to remove self-defense from

the jury's consideration, so having raised that defense, there would be no legitimate tactical reason not to object to the instruction.

The aggressor instruction did nothing to advance the defense theory; it actually undermined the defense and assisted the State in arguing its case. The jury having been instructed on self-defense, there was no point in permitting the jury to disregard the self-defense theory by permitting an instruction that essentially told the jury that the defense was unavailable. The only purpose of an aggressor instruction is to remove self-defense from the jury's consideration. Having ultimately argued that defense, there would be no legitimate tactical reason for defense counsel not to object to the instruction.

There is a reasonable probability the outcome might have been different but for counsel's failure to object. As argued above, had counsel objected to the aggressor instruction, the trial court would have been required under the law and the evidence to reject it. The jury then at least would have had to evaluate the self-defense claim fully. There is a reasonable probability the outcome of the trial would have been different had the instruction not been given. Because counsel did not object, however, the aggressor instruction went to the jury and permitted a finding (which was urged by the prosecutor) that Mr. Chiechi provoked

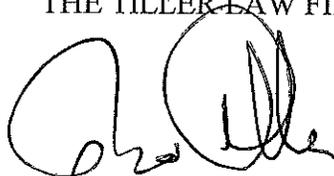
the incident and was thus not entitled to his claim of self-defense. This error undermines confidence in the outcome of the trial.

**E. CONCLUSION**

For the foregoing reasons, Mr. Chiechi respectfully requests this Court reverse the conviction.

DATED: March 8, 2019.

Respectfully submitted,  
THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read 'Peter B. Tiller', written over a horizontal line.

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**CERTIFICATE OF SERVICE**

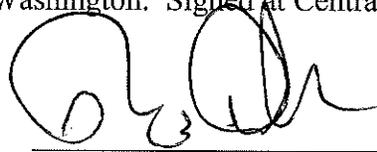
The undersigned certifies that on March 8, 2019, that this Appellant's Corrected Opening Brief was sent by the JIS link to Mr. Derek M. Byrne, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, a copy was emailed to Ryan Paul Jurvakainen Prosecuting Attorney and copies were mailed by U.S. mail, postage prepaid, to the following:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on March 8, 2019.



PETER B. TILLER

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**March 08, 2019 - 3:50 PM**

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